

**REMARKS**

The Final Office Action dated October 8, 2003, has been received and reviewed.

Claims 1-30, 42-49, and 75-88 are currently pending and under consideration in the above-referenced application. Each of claims 1-8, 10-19, 21-27, 42-49, 75-77, 79, 81-84, 86, and 88 stands rejected. It has also been indicated that claims 9, 20, 78, 80, 85, and 87, which have been objected to, recite allowable subject matter.

It is proposed that claim 1 be amended to incorporate the elements previously recited in claim 7. It is also proposed that claim 7 be canceled without prejudice or disclaimer. The remaining claim amendments, including revisions to claims 1-6, 8, 10-19, 21, 24-27, 42-49, 75-77, 79, 81-84, 86, and 88, merely replace the term "said" with "the" and, therefore, do not materially alter the scope of any of these claims.

Reconsideration of the above-referenced application is respectfully requested.

**Rejections Under 35 U.S.C. § 103(a)**

Claims 1-8, 10-19, 21, 42-49, 75-77, 79, 81-84, 86, and 88 stand rejected under 35 U.S.C. § 103(a).

M.P.E.P. § 706.02(j) sets forth the standard for a rejection under 35 U.S.C. § 103(a):

To establish a *prima facie* case of obviousness, three basic criteria must be met. First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or combine reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art reference (or references when combined) must teach or suggest all the claim limitations. The teaching or suggestion to make the claimed combination and the reasonable expectation of success must both be found in the prior art, and not based on applicant's disclosure. *In re Vaeck*, 947 F.2d 488, 20 USPQ2d 1438 (Fed. Cir. 1991).

Anderson in View of Kofoed

Claims 1-6, 8, 10-19, and 21 stand rejected under 35 U.S.C. § 103(a) for reciting subject matter which is purportedly anticipated by that described in U.S. Patent 4,440,177 to

Anderson et al. (hereinafter “Anderson”), in view of teachings from U.S. Patent 5,789,660 to Kofoed et al. (hereinafter “Kofoed”).

It is proposed that independent claim 1 be amended to include the elements recited in claim 7; specifically, that the secondary respiratory detection component thereof comprises at least one luminescence quenching sensor. As noted at page 3 of the Final Office Action, neither Anderson nor Kofoed teaches or suggests an airway adapter that includes a respiratory detection component which comprises a luminescence quenching sensor. Accordingly, it is respectfully submitted that the teachings of Anderson and Kofoed, taken either separately or together, do not support a *prima facie* case of obviousness against amended independent claim 1 under 35 U.S.C. § 103(a).

Therefore, under 35 U.S.C. § 103(a), amended independent claim 1 is allowable over Anderson and Kofoed, taken either individually or in combination.

Each of claims 2-6, 8, 10-19, and 21 is allowable, among other reasons, for depending either directly or indirectly from claim 1, which is allowable.

Anderson, Kofoed, and Labuda

Claims 7, 22-27, 42-49, 75-77, 79, 81-84, 86, and 88 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over teachings from Anderson, in view of the teachings of Kofoed and, further, in view of the subject matter taught in U.S. Patent 6,325,978 to Labuda et al. (hereinafter “Labuda”).

Labuda issued on December 4, 2001, from a patent application that was filed on August 4, 1998. While the August 4, 1998, filing date of Labuda predates the April 24, 2001, filing date of the above-referenced application, Labuda did not issue until after the above-referenced application was filed. As such, Labuda only qualifies as prior art to the above-referenced application under 35 U.S.C. § 102(e).

Moreover, Labuda, as indicated on the cover page thereof, has been assigned to NTC Technology Inc., the same entity to which the inventors named in the above-referenced application *were, at the time the above-referenced application was filed, obligated to assign* and have assigned *their interests in the above-referenced application*.

In view of the foregoing, it is respectfully submitted that Labuda cannot be relied upon in a 35 U.S.C. § 103(a) rejection of any of the claims of the above-referenced application.

Further, as has been indicated at page 3 of the Final Office Action, neither Anderson nor Kofoed teaches or suggests an apparatus which includes a luminescence quenching sensor. Thus, Anderson and Kofoed do not teach or suggest each and every element of any of claims 7 (proposed to be incorporated into claim 1) 22-27, 42-49, 75-77, 79, 81-84, 86, and 88. Therefore, without teachings from Labuda, Anderson and Kofoed do not support a *prima facie* case of obviousness against any of these claims.

Claim 7 has been canceled without prejudice or disclaimer, rendering the rejection thereof moot. Notably, it is proposed that the elements that were previously recited in claim 7 be incorporated into independent claim 1.

For these reasons, it is respectfully submitted that, under 35 U.S.C. § 103(a), each of claims 1, 22-27, 42-49, 75-77, 79, 81-84, 86, and 88 is allowable over Anderson and Kofoed.

In view of the foregoing, it is respectfully requested that the 35 U.S.C. § 103(a) rejections of claims 1-7, 10-19, 21, 42-49, 75-77, 79, 81-84, 86, and 88 be withdrawn.

#### **Allowable Subject Matter**

The indication that claims 9, 20, 78, 80, 85, and 87 recite allowable subject matter is noted with appreciation. None of these claims has, however, been amended to independent form as the subject matter of the claims from which they depend is believed to be allowable over the art of record.

#### **Entry of Amendments**

It is respectfully requested that the proposed claim amendments be entered. The proposed amendments do not introduce new matter into the application, nor would they require an additional search. Moreover, by incorporating the elements of claim 7 into independent claim 1, the number of issues that remain for purposes of appeal is reduced. In the event that a decision is

made not to enter the proposed claim amendments, entry thereof upon the filing of a Notice of Appeal in the above-referenced application is respectfully requested.

**CONCLUSION**

It is respectfully submitted that each of claims 1-6, 8-30, 42-49, and 75-88 is allowable. An early notice of the allowability of each of these claims is respectfully solicited, as is an indication that the above-referenced application has been passed for issuance. If any issues preventing allowance of the above-referenced application remain which might be resolved by way of a telephone conference, the Office is kindly invited to contact the undersigned attorney.

Respectfully submitted,



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Date: December 8, 2003

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